NEPA AFTER NATURAL RESOURCES DEFENSE COUNCIL V. UNITED STATES DEPARTMENT OF THE NAVY

BY: LCDR MICHAEL M. BATES

UNIVERSITY OF CALIFORNIA, BERKELEY
SCHOOL OF LAW
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I. Introduction

On September 17, 2002, the latest skirmish in an ongoing battle over the extra-territorial application of the National Environmental Policy Act (NEPA) was fought in the U.S. District Court for the Central District of California, pitting the Natural Resources Defense Council and other environmental groups against the United States Navy.[1] On a day that found both environmentalists and the Department of Justice claiming victory, Judge Christina A. Snyder held that the U.S. Navy's Littoral Warfare Advanced Development (LWAD) Program as a whole was not subject to NEPA, but that individual sea tests under the program are.[2] More important, however, was her holding that NEPA applies to federal actions that may affect the environment within the 200 nautical mile Exclusive Economic Zone (EEZ).

In this paper I will examine Judge Snyder's holding in light of the legislative intent behind NEPA, the executive interpretation expressed in Executive Order 12,114,[3] and case law regarding the extra-territorial application of NEPA. Additionally, I will discuss the precedential weight that NRDC v. United States Department of the Navy should be given in future cases and whether the uncertainty surrounding the extraterritorial application of NEPA is now any clearer. Finally, I

[1] Natural Resources Defense Council v. United States Department of the Navy, No CV-01-07781 Slip op. At 21 (C.D. Cal. Sept. 19, 2002)
[2] Gary Polakovic, *Environmental Review of Navy's Sonar Testing Upheld*, Los Angeles Times, September 20, 2002, at A1.
[3] Exec. Order No. 12,114, 3 C.F.R. 356 (1980) *reprinted in* 42 U.S.C. § 4321 (1988).

will conclude with recommendations designed to bring clarity and uniformity to the application of NEPA worldwide.

II. Background

Natural Resources Defense Council v. United States Department of the Navy is one of a several recent cases relating to the use of active sonar, for both scientific and military purposes, and its potentially damaging impact on marine mammals. Conceived in 1996, the LWAD program was designed to address the changing submarine threat conditions following the collapse of the Soviet Union. A new threat is perceived to come from smaller diesel electric submarines which have become increasingly quieter and more accessible to potentially hostile nations bordering the littorals (the shelf area around most land masses extending from a few miles to several hundred miles off shore). These littoral areas present more of a challenge to anti-submarine warfare than the deep ocean due to variable oceanographic conditions (such as dramatic current and temperature changes) and increased marine traffic emitting sounds which interfere with and otherwise complicate submarine detection. The LWAD Program is the primary vehicle for coordination of testing and demonstration of Littoral Anti-Submarine Warfare (LASW) technologies.[4] The sea tests (2-3 per year) generally involve the use of both active and passive sonar. Active sonar involves the generation of sound from an underwater transmitter and then detecting and processing the return signal, while passive sonar involves simply listening for sounds. Many tests have already been conducted in locations throughout the world, including the Gulf of Mexico, Long and Onslow Bays, near the Hudson

Canyon, off-shore from Southern California and Oregon, the Adriatic Sea, the East China Sea, and the western Pacific.[5] While traditional passive sonar proved very effective during the Cold War at detecting relatively noisy submarines in the deep ocean, it has proven ineffective in noisy, crowded littoral areas, particularly in recent years due to advancement in sound quieting techniques.[6] The U.S. Navy has determined that the use of low frequency active sonar best meets the current need for reliable detection of quieter, harder to find submarines. In reaching this conclusion, the Navy considered the potential environmental impacts and determined that geographic restrictions and monitoring mitigation will ensure marine mammals are not exposed to active sonar greater than 185 dB and therefore the impact on marine mammals will be negligible.[7]

Environmental groups, however, have taken issue with these conclusions. They claim that the Navy's plan to deploy its powerful active sonar system will have catastrophic effects on marine mammals. Potential impacts include death from lung hemorrhage, tissue trauma, hearing loss or impairment, psychological and physiological stress (making marine mammals more vulnerable to disease, parasites and predators) and disruption of traditional migration, breeding and feeding patterns.[8] As evidence, they cite the stranding of whales and dolphins, many with hemorrhaging apparent around their eyes and ears, on beaches in the Bahamas in 2000 after a U.S.

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[4] LWAD mission description, available at http://www.onr.navy.mil/oas/projects/lwad/users_guide.htm.
[5] Certification of Administrative Record at 4, Scott Martin Tilden, CDR, USN, Natural Resources Defense Council v. United States Department of the Navy, (No CV-01-07781).
[6] *Id.* at 3.
[7] Record of Decision for Surveillance Towed Array Sensor System Low Frequency Active Sonar, Department of the Navy/Department of Defense, 3801-FF, July 16, 2002.
[8] The SURTASS LFA Threat, available at http://www.earthreality.net/Stop_LFAS.htm and Low Frequency Active Sonar available at http://www.acousticecology.org/srlfas.html

Navy battle group used active sonar in the immediate area.[9] They also attribute a mass stranding of beaked whales off the west coast of Greece in 1996 to an active sonar system being tested by NATO at the time.[10] Environmental groups allege that the Navy was made aware of the potential harmful effects of active sonar when, during one of their initial tests off the east coast of the island of Hawaii, a snorkeler was injured and Humpback whales were driven from the test area shortly after testing began.[11]

III. NRDC v United States Department of the Navy

Claiming a flagrant lack of compliance with environmental statutes by the Navy in conducting LWAD sea tests, the Natural Resources Defense Council (NRDC) filed suit seeking to require the Navy to carry out environmental studies as required by NEPA prior to conducting further sea tests. NRDC claimed that, under NEPA, not only is each individual sea test an agency action subject to environmental review, but the LWAD Program as a whole should be evaluated in a program wide Environmental Impact Statement (EIS). This case is ripe with environmental law issues, with NRDC also alleging the Navy had violated the Endangered Species Act, the Marine Mammal Protection Act and the Magnuson-Stevens Fishery Conservation and Management Act.

In a motion for summary judgment, the Navy alleged that NRDC lacked standing to challenge the LWAD program. The Navy also claimed that the LWAD

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[9] Spread of Active Sonar Threatens Whales at http://www.nrdc.org/wildlife/marine/nlfa/asp
[10] *Id.*
[11] *Supra* note 7.

Program is not a reviewable final agency action and that individual tests conducted beyond U.S. territory are not subject to environmental review under NEPA.

When the smoke cleared, the court found that NRDC had standing as they had observed and enjoyed wildlife in many of the areas where LWAD tests had been conducted.[12] The court did not reach the merits of the claims under the Endangered Species Act, the Marine Mammal Protection Act, and the Marine Sanctuaries Protection Act because the individual sea test challenged, Sea Test 02-2, was ultimately canceled by the Navy. The most significant holdings, however, were related to the NEPA claims. In a victory for the defendant, Judge Snyder found that the LWAD Program is only engaged in general planning and does create activities with an impact on the environment. Therefore, the Navy's decision to conduct environmental assessments for each individual sea test, and not for the LWAD Program as a whole, was not arbitrary and capricious.[13] Finally, in a holding that may have impacts even beyond severely limiting the testing and ultimate deployment of a defensive active sonar system, the court found that NEPA applies to federal actions which may affect the environment within 200 nautical mile Exclusive Economic Zone (EEZ).[14] In reaching her decision, Judge Snyder noted that the decision making process involved in preparing the sea tests occurred within the United States and that the United States has significant rights and "substantial, if not exclusive legislative control of the EEZ."[15]

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[12] *Supra* note 1 at 13.
[13] *Id.*
[14] *Id.* at 21.
[15] *Id.*

Natural Resources Defense Council v. the United States Department of the Navy is the first case to specifically address the applicability of NEPA to the EEZ. Established in 1983 by Presidential Proclamation, the EEZ "extends for a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured."[16] The EEZ is not part of United States Territory and all nations enjoy the high seas freedom of navigation, overflight and other internationally lawful uses of this area. The United States, however, enjoys exclusive rights regarding the management of natural resources within its EEZ.[17]

IV. NEPA

The National Environmental Policy Act of 1969 was enacted by Congress in response to growing national concern over the increased degradation the environment. The first statute to address environmental concerns within a comprehensive national policy, NEPA remains the cornerstone of American environmental protection. Congress recognized the need for man and nature to exist in "productive harmony" for the benefit of present and future generations of Americans.[18] Under NEPA, federal agencies proposing major action must consider the environmental impacts of such action. Procedural in nature, NEPA requires federal agencies to perform an environmental impact statement (EIS) for all major

[16] Pres. Proc. No. 5030, 48 Fed. Reg. 10605 (March 10, 1983).
[17] *Id.*
[18] The National Environmental Policy Act of 1969, Pub. L. No. 91-190, 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4370c (1988 & Supp. V 1993)).

federal actions that will have a significant impact on the environment.[19] In particular, all agencies shall:

> Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
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> (i) the environment of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short term uses of man's environment and the maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[20]

The EIS process requires extensive reviews of proposed Federal action. This process is subject to public participation and judicial review. Litigation over an incomplete or inadequate EIS can delay or even stop a project all together. Additionally, damaging information uncovered during this assessment process may incite public outrage, or provide the basis for legal challenge under other environmental laws.

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[19] 42 U.S.C. § 4332 (2)(C) (1988).
[20] *Id.*

The sweeping and general language of NEPA, however, has led to extensive litigation over the territorial application of the EIS requirement. The language of NEPA fails to clearly define the reach of the statute. It is not clear from the face of the broad language whether the term "environment" includes the environment outside of the territory of the United States. Section 101 of NEPA recognizes "the profound impact of man's activity on the interrelations of all components of the natural environment" and "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man."[21] Section 102 (2)(F) requires all federal agencies to "recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."[22] The broad, sweeping language of NEPA has led some to conclude that Congress fully intended to apply the statute worldwide.[23]

Others, however, find NEPA's language too vague and filled with generalities to be conclusive of Congressional intent.[24] The extraterritorial application of NEPA must be expressed through a "plain statement of extraterritorial statutory effect,"[25] and the EIS requirement of NEPA contains no such language.[26] Other portions of

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[21] *Id.* 4331(a).
[22] *Id.* 4332(2)(F).
[23] *See* David Young, *The applications of Environmental Impact Statements to United States Participation in Multinational Development Projects*, 8 Am. U.J. Int'l L. & Pol'y309, 316-17 (1992).
[24] *See* George H. Keller, Note Greenpeace v. Stone: *The Comprehensive Environmental Impact Statement and the Extraterritorial Reach of NEPA,* 14 U. Haw. L. Rev. 751, 768-71 (1992); Comment, *NEPA's Role in Protecting the World Environment,* 131 U. Pa. L. Rev.353, 360-64 (1982).
[25] Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 109 (1991).
[26] *Supra* note 19 § 4332(2)(C).

NEPA assume that the focus of the EIS requirement is wholly domestic. The last sentence of Section 102(2)(C) requires federal agencies to seek the views of State and local agencies on EISs, but contains no requirement that they seek the views of foreign governments or international agencies.[27] In addition, Section 102(2)(D) provides that EISs for actions under grants to states may be prepared by state agencies or officials, but makes no analogous provision for actions funded under grants to foreign governments or international bodies, as would be the case if the EIS requirement applied to such projects.[28] Furthermore, Section 102(2)(D) specifically requires that in the case of state agency-prepared impact statements, the views of other states and federal land management agencies must be solicited for projects that may have significant impacts upon lands administered by them, but it contains no similar requirement that the views of foreign countries or international agencies be solicited, as would have been done if Section 102(2)(C) applied beyond United States territory. [29]

When Congress wants to accomplish a particular goal, it knows how to do so. The Supreme Court has specifically noted "when it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.[30] For example, certain provisions of the Clean Water Act [31] apply to discharges in the high seas.[32] Also, the Foreign Assistance Act requires assessments of impacts of development projects "upon the environment and natural resources of developing countries."[33]

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[27] *Id.*
[28] *Id.* § 4332(2)(D).
[29] *Id.* § 4332(2)(D)(iv).
[30] Argentine Republic v. Amerada Hess Shipping Corp, 488 U.S. 428, 440 (1989).
[31] 33 U.S.C. § 1251, et seq.
[32] *See* Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 11 (1981).
[33] 22 U.S.C. § 2151.

Given the absence of clear language indicating Congressional intent, one must review the legislative history for indications that Congress intended to apply NEPA worldwide.

V. Legislative history

NEPA commentary is found in the Congressional White Paper on a National Policy for the Environment.[34] Recognizing the need for our national environmental policy to consider global impacts, the White Paper states that "the global character of ecological relationships must be the guide for domestic activities. Ecological considerations should be infused into all international relations."[35] The white paper concludes by suggesting a statement of policy outlining Congress' intent to consider the "worldwide context" of the environment.[36]

During Senate consideration of the Conference Report on NEPA[37], Senator Henry "Scoop" Jackson emphasized the "need to seek solutions to environmental problems on an international level because they are international in origin and scope. The earth is a common resource, and cooperative effort will be necessary to protect it."[38] In reference to section 102 (2) (F) (discussed above) he noted that because "environmental problems are not confined by political boundaries, all agencies of the Federal Government which have international responsibilities are authorized and directed to lend support to appropriate international efforts to anticipate and prevent a

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[34] Senate Comm. On Interior and Insular Affairs an House Comm. On Science and Astronautics, 90th Cong., 2d Sess., Congressional White paper on a National Policy for the Environment (July 17, 1968(, *reprinted in* 115 Cong. Rec. 29,078-82 (1969).
[35] *Id.* at 29,082.
[36] *Id.*
[37] H.R. Rep. No.765, 91st Cong.,1st Sess. 7-12 (1969) *reprinted in* 1969 U.S.C.C.A.N. 2767.
[38] S. Rep. No. 91-296, 91st Cong., 1st Sess. 21 *reprinted in* 115 Cong Rec 40,416 (1969).

decline in the quality of the worldwide environment."[39] In the Conference Committee process, the Conferees added a requirement that federal agency support for international efforts could only be done "where consistent with the foreign policy of the United States,"[40] in response to concerns over intruding into the foreign policy arena. While this "cooperative mechanism" was intended to address concerns over the worldwide nature of environmental problems, the EIS requirement of Section 102(2)(C) was never altered to include a "plain statement" applying NEPA's EIS requirement extraterritorially. While Congress heard testimony about the worldwide nature of environmental problems and expressed concern about these problems, it would appear it intended NEPA's EIS requirement to apply only domestically, and reserved consideration of extraterritorial matters for the sphere of international cooperation.

However, note that in 1970, during oversight hearings on agency compliance with NEPA, the congressional subcommittee rejected the State Department's interpretation that NEPA's EIS requirement is limited to actions within the United States (this particular hearing dealt with foreign aid programs).[41] In concluding that NEPA requires an environmental assessment of foreign, as well as domestic projects, the Committee stated "the history of the Act makes it quite clear that the global effects of environmental decisions are inevitably a part of the decision-making process and must be considered in that context."[42] While there is ample evidence from the legislative history of NEPA to support arguments both for and against the

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[39] *Id.*

[40] *See* "Major Changes in S.1075 as Passed by the Senate", H.R. Conf. Rep. No. 765, 91st Cong., 1st Sess. (Dec. 17, 1969) Exh. 10, *reprinted at* 115 Cong. Rec. H. 40923 (Dec. 22, 1969)(Ex. 11).

extaterritorial application of NEPA, the legislative history does not provide conclusive evidence of congress's intent.

VI. Executive Order 12,114

In January of 1979, President Carter, in an effort to cover a perceived gap in NEPA's coverage, signed Executive Order 12,114. The goal of Executive Order 12,114 is to "further the purpose of the National Environmental Policy Act...consistent with the foreign policy and national security policy of the United States."[43] The Executive Order effectively strikes a balance between the interests of environmental assessment and the need to ensure the integrity of the Executive Branch authority over the conduct of foreign relations and national security matters. Without specifically limiting NEPA's extraterritorial reach, the Order set forth requirements for analysis of environmental impacts abroad from federal actions. The Order requires agencies approving actions outside of the United States to prepare an analysis of the environmental impact (Overseas Environmental Assessment) and consider it in their decision making process.[44] While similar to NEPA in its approach, Executive Order 12114 falls far short of affording the same environmental protections found in NEPA. The Order provides for numerous exemptions, including actions taken by the President or pursuant to directions of the President or a cabinet officer.[45] Also, section 3-1 of the Order states that its requirements establish internal

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[41] House Comm. On Merchant Marine and Fisheries, Administration of the National Environmental Policy Act, H.R. Rep. No. 92-316, 92nd Cong., 1st Sess. 1971.
[42] *Id.* at 33.
[43] *Supra* note 17.
[44] *Id.* § 2-3 at 356.
[45] *Id.* § 2-5 at 356.

procedures but do not provide for enforcement through a private cause of action.[46] Lacking enforcement capabilities, the Order has been generally ineffective, although in some cases courts have viewed compliance with the Order as a factor in determining whether to apply NEPA beyond United States territory.[47] Finally, Executive Order 12114 does little to clarify the reach of NEPA. The purpose and scope section of the Order acknowledges that it is based on authority independent of NEPA[48] and section 2-4 states that the Order was not intended to invalidate any existing regulations.[49]

VII. Case Law

The body of case law interpreting the extraterritorial reach is extensive. Courts have been presented with cases involving environmental impacts exclusively in foreign countries, environmental impacts in the global commons, and environmental impacts both in the United States and beyond the territory of the United States. Unfortunately, in the quarter century since NEPA's inception, the ambiguity regarding the extraterritorial application of NEPA has not been clearly resolved by the U.S. courts. We have yet to encounter a case that has given a definitive holding on NEPA's reach beyond U.S. borders. The specific facts of NEPA cases has generally lent to narrow holdings of limited guidance or precedence, or resulted in agency compliance or withdrawal of the proposed action prior to court resolution of the extraterritorial application issue.

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[46] *Id.* § 3-1 at 356.
[47] *See, e.g.,* Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990).
[48] *Supra* note 17 § 1-1 at 356.
[49] *Id* § 2-4 at 356.

A. The presumption against the extraterritorial application of U.S. laws

In 1909, Justice Oliver Wendell Holmes established the now generally accepted rule against the extraterritorial application of U.S. laws. While declining to apply the Sherman Act to a monopoly in Costa Rica (although both parties were U.S. corporations), he wrote "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[50] Holmes concluded that a nation's legitimate regulatory jurisdiction extends only to the borders of its territory and, absent a clear mandate by Congress, a court must confine the operation and effect of a statute to those territorial limits.[51] The Supreme Court discussed this standard again in Foley Bros. v. Filardo,[52] and Equal Opportunity Commission V. Arabian American Oil Co. (Aramco).[53] In both cases the court recognized a need to avoid international conflicts of law and found that the presumption against the extraterritorial application of U.S. law is overcome only by proof of an affirmative congressional intent to apply a statute beyond U.S. territory.[54]

In finding that NEPA applies to federal action that may affect the environment in the EEZ, Judge Snyder did not disregard the presumption against the extraterritorial application of U.S. law. The freedom of the seas has always been limited by customary international law permitting national jurisdiction over the

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[50] American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).
[51] *Id.* At 357.
[52] Foley Bros v. Filard, 336 U.S. 281 (1949).
[53] Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco), 449 U.S. 244 (1991).
[54] *Id.* at 248 and *supra* note 22 at 285-86 (reasoning that Congress is limited to legislating domestic matters and should not interfere with the sovereignty of another state).

marine zone, or territorial sea, just off the nation's coast. Initially this zone was three miles, or the traditional "cannon shot." Over the years, however, the boundaries have been pushed farther out to sea by coastal states, over heated protests from fishing nations. The United States contributed to the "creeping jurisdiction" of the territorial seas when it issued the Truman Proclamations in 1945, extending U.S. coastal jurisdiction and control to the natural resources, seabed and fisheries of its continental shelf.[55] The United Nations Convention on the Law of the Sea (UNCLOS)[56], signed in 1982 and came into force in 1994, established internationally recognized boundaries on the territorial sea (12 nautical miles) and the EEZ (200 nautical miles).[57] While the United States has not ratified UNCLOS, it has agreed to follow its provisions and in 1983 unilaterally declared a 200 nautical mile EEZ.[58] While UNCLOS grants extensive rights to a nation over its EEZ, with these rights come increased environmental responsibility. UNCLOS states that a coastal state may exercise authority to protect and preserve the marine environment in its EEZ and "shall" ensure the conservation and utilization of its living marine resources.[59] In her holding in NRDC v. United States Department of the Navy, Judge Snyder recognized that the authority to manage and exploit resources in the EEZ goes hand in hand with the responsibility to safeguard the environment in the EEZ. She also noted the general absence of foreign policy concerns regarding actions and impacts within the EEZ due to the authority the United States exercises there.

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[55] 10 Fed. Reg. 12304, 12305, Sept. 28, 1945.
[56] U.N. Doc A/CONF.62/122, *reprinted in* 21 I.L.M.1261 (1982)
[57] *Id.* Articles 3 and 57.
[58] *Supra* note 15.

B. NEPA Case Law

The first case to review the application of NEPA in an extraterritorial setting was Wilderness Society v. Morton.[60] American environmental groups had filed suit seeking an injunction, claiming non-compliance with NEPA prior to issuance of a permit for the trans –Alaska pipeline.[61] A Canadian group, the Wilderness Society, sought to intervene and ensure that Canadian interests were represented.[62] The District Court denied the groups application to intervene, claiming that American groups adequately represented Canadian interests, and that protection of the American environment would by necessity protect the Canadian environment.[63] The Court of Appeals reversed and granted the Wilderness Society standing, holding that the "interests of the United States and Canadian environmental groups were sufficiently antagonistic" to require approval of the grant for intervention.[64] In allowing foreign nationals standing in NEPA litigation, the court noted that the holding would not create "interference with the conduct of foreign relations."[65] This concern over the potential impact on U.S. foreign policy when applying NEPA extraterritorial would become a common theme in future cases.

The issue of NEPA's application to federal actions in United States trust territories was addressed in Saipan ex rel. Guerrero v. United States[66] and People of

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[59] *Supra* note 27, Articles 56, 61 and 62.
[60] 463 F.2d 1261 (D.C. Cir. 1972) (per curiam).
[61] *Id.* at 1261.
[62] *Id.* at 1261-62.
[63] *Id.* at 1262.
[64] *Id.*
[65] *Id.* at 1263.
[66] 356 F. Supp. 645 (D. Haw. 1973) aff'd as modified, 502 F.2d 90 (9th Cir. 1974), cert. Denied, 420 U.S. 1003 (1975).

Enewetak v. Laird.[67] In *Guerrero*, the plaintiffs sought an injunction preventing the construction of a hotel on public land in Saipan until NEPA was complied with.[68] The case was dismissed by the district court and the United States Court of Appeals affirmed the dismissal holding that, while NEPA applies in trust territory, action by the trust territory government is not federal action under NEPA.[69] In *Enewetak*, the United States District Court for the District of Hawaii found NEPA applicable to federal actions in the Pacific Island Territories. The plaintiffs, residents and political leaders of the Enewetak atoll, sought to enjoin tests involving the detonation of powerful explosives to determine the vulnerability of U.S. defenses to nuclear attack.[70] In this case, the defendants, the Secretary of Defense, Secretary of the Air Force, Assistant Secretary of the Air Force, Commander in Chief of the United States military forces in the pacific ocean area, and Director of the Defense Nuclear Agency, were clearly federal agencies. In examining the statutory language of NEPA, the court found the statute "silent on the extent of its coverage."[71] Next, the court looked to the legislative history, and noting the use of the term "nation" rather than "United States" in Section 102(2)(F) concluded that "Congress intended NEPA to apply in all areas under its exclusive control. In areas like the Trust Territory there is little, if any, need for concern about the conflicts with United States foreign policy or the balance of world power."[72] In examining the Trusteeship Agreement, the court noted that the United States has "full powers of administration, legislation and jurisdiction"

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[67] 353 F. Supp. 811(D. Haw. 1973).
[68] Saipan ex rel. Guerero v. United States Dept. of Interior, 502 F.2d 90, 93 (9th Cir. 1974), cert. denied 420 U.S. 1003 (1975).
[69] *Id.* at 96.
[70] *Supra* note 68 at 814.
[71] *Id.* at 815.
[72] *Id.* at 818.

over the territory.[73] Based on the authority of the United States over this territory, the court found it "unnecessary to decide the question" of extraterritorial application of NEPA, but instead included the Atoll of Enewetak within the "Nation" afforded protection under NEPA.[74]

1974 and 1975 saw environmental groups the Sierra Club and the Environmental Defense Club file suits against the Atomic Energy Commission and the United States Agency for International Development seeking to apply NEPA extraterritorially to the export of nuclear fuels and an international pest control program. No decision was reached on the merits, however, as the defendants in both cases conceded that NEPA applied to their actions and prepared EISs in accordance with NEPA.[75]

The issue of NEPA's extraterritorial application next appeared in the Sierra Club V. Adams,[76] where a decision enjoining the United States Department of Transportation's participation in the construction of the Darien Gap Highway from Panama to Colombia (for noncompliance with NEPA) was appealed by federal officials.[77] The district court had ordered the Government to file a complete EIS under NEPA.[78] On appeal, the United States Court of Appeals for the District Court of Columbia Circuit found the EIS to be in compliance with NEPA.[79] While acknowledging that the project would have a negative impact on the native

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[73] *Id.* n. 12.
[74] *Id* at 817 n.10.
[75] *See* 4 Envtl. L. Rep. 20,685 (D.D.C. Aug. 3 1974) and 6 Envtl. L. Rep. 20,121 (D.D.C. Dec 5, 1975).
[76] Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978).
[77] *Id.* at 390.
[78] Sierra Club v. Coleman, 421 F. Supp. 63, 65 (D.D.C. 1976). The district court found the EIS deficient in the manner it addressed: (1) the potential transmission of foot and mouth disease, (2) the impact on indigenous people in the area, and (3) alternatives to the project.
[79] *Supra* note 77 at 393-396.

population, the court determined that the EIS analysis complied with the requirements of NEPA.[80] In addressing the applicability of NEPA to the project, the court merely "assumed" that NEPA applied to the construction in Panama and left the resolution of the question of the applicability of NEPA outside of the United States "to another day."[81]

National Organization for the Reform of Marijuana Laws (NORML) v. Department of State involved United States assistance to Mexican efforts to eradicate marijuana and poppy plants through herbicide (paraquat) spraying.[82] The government had agreed to prepare an EIS concerning the effects of the spraying program in the United States, but asserted that that a limited "environmental analysis" and not an EIS was required for the program's environmental impact in Mexico.[83] The plaintiff sought a declaratory judgment indicating that the Department of State was in violation of the EIS requirement of NEPA, and an injunction enjoining the United States from assisting with the spraying program until NEPA was complied with.[84] The United States District Court for the District of Columbia, based on the programs effects within the United States, held that the participation by the United States amounted to "federal" action under NEPA and was subject to the EIS requirement of NEPA.[85] Satisfied with the plans for an EIS related to the effects in the United States and an "environmental analysis" of the effects in Mexico, the court declined to issue an injunction and, like the court in Sierra Club v. Adams, left open the question of

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[80] *Id.* at 396.
[81] *Id.* at 392 n. 14 (D.C. Cir. 1978).
[82] 452 F. Supp. 1226 (D.D.C. 1978)
[83] *Id.* at 1232.
[84] *Id.* at 1228.
[85] *Id.* at 1232.

NEPA's extraterritorial applicability. [86] Both Sierra Club v. Adams and NORML v. United States Department of State applied NEPA to federal actions with environmental impacts both within and outside of the United States, but failed to address the applicability of NEPA to projects with no domestic impacts.

Unlike Sierra Club v. Adams and NORML v. United States Department of State, Natural Resources Defense Council v. Nuclear Regulatory Commission[87] offers a more definitive holding regarding the extraterritorial application of NEPA and the EIS requirement. The case involved efforts by the government of the Philippine Islands to acquire its first nuclear generator.[88] Westinghouse had filed an export licensing application to sell generator components to the National Power Corporation of the Philippines.[89] In issuing the license, the Nuclear Regulatory Commission interpreted NEPA to apply to environmental impact felt within the United States and in the global commons, but not in the Philippine Islands.[90] The Natural Resources Defense Council sought review of the licensing decision, noting the proposed site proximity to two U.S. military bases, four active volcanoes and a known seismically active area[91]. They asserted that the Nuclear Regulatory Commission had failed to meet its obligations under both the Atomic Energy Act[92] and NEPA (for failing to perform a site-specific EIS).[93] Prior to addressing the matter, the United States Court of Appeals for the District of Columbia acknowledged that while many courts had

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[86] *Id.* at 1235.
[87] 647 F. 2d 1345 (D.C. Cir 1981)
[88] *Id.* at 1351.
[89] *Id.*
[90] *Id.* at 1353.
[91] *Id.*
[92] *Id.* at 1355. Petitioners alleged a violation of 103(d) of the Atomic Energy Act, 42 U.S.C. 2133(d), which prohibits the issuance of a license where it would be "inimical to common defense and security or to the health and safety of the public."

been faced with the question of NEPA's application abroad none had adequately addressed it.[94] In a narrowly drafted opinion, the court ruled that NEPA did not apply to the export of nuclear technology where the environmental impacts would occur exclusively in a foreign jurisdiction.[95] The court stated:

> "the NEPA jurisprudence indicates that exclusively foreign impacts do not automatically invoke the statute's environmental obligations. I find only that NEPA does not apply to NRC nuclear licensing decisions and not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad."[96]

Although limiting its holding to licensing decisions by the Nuclear Regulatory Commission, the court recognized that U.S. laws may be enforced beyond U.S. borders when the U.S. "holds all the cards."[97] When applying U.S. law extraterritorially, however, the court recognized the potential conflict with foreign policy goals and recommended a balancing test, with the conduct of United States foreign relations carrying significant weight.[98] Finding that the "foreign policy" clause of section 102(2)(F) limited the extraterritorial application of NEPA's EIS requirement, the court stated that NEPA "looks toward cooperation, not unilateral action, in a manner consistent with [United States] foreign policy."[99]

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[93] *Id.*
[94] *Id.*
[95] *Id.* at 1366.
[96] *Id.*
[97] *Id.* at 1357.
[98] *Id.*
[99] *Id.* at 1366. 102(2)(F) provides :

> All agencies of the Federal Government shall...recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline of mankind's world environment.

The concern over foreign policy considerations in the application of NEPA was raised again in Greenpeace U.S.A. v. Stone.[100] In *Greenpeace*, the district court of Hawaii addressed the extraterritorial application of NEPA to U.S. Army's removal of obsolete chemical munitions stored in the Federal Republic of Germany, and their transportation to the Johnston Atoll, a U.S. territory, for destruction.[101] Rather than conducting a comprehensive EIS covering the entire operation, the Army prepared separate EISs for the construction and operation of the Johnston Atoll facility, the disposal of solid and liquid wastes that the facility would produce and the disposal of the munitions themselves.[102] The Army also conducted an Environmental Assessment pursuant to Executive Order 12,114 analyzing the environmental impacts of the transoceanic shipment of the munitions from West Germany to the Johnston Atoll, but neglected to conduct an analysis covering the shipment of munitions within West Germany.[103] Greenpeace challenged the lack of a comprehensive EIS and sought to enjoin the shipment.[104] In ruling on the plaintiffs motion for a preliminary injunction, the court was particularly sensitive to the fact that movement of munitions resulted directly from an agreement between the President and a foreign head of state.[105] Citing the NRDC v. NRC holding, the court found that NEPA did not apply to the movement of munitions within Germany due to the absence of an express congressional mandate to apply NEPA in a foreign country, and a reluctance to

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[100] 748 F.Supp. 749 (D. Haw. 1990).
[101] *Id.* at 752. Under agreements entered into by Presidents Reagan and Bush, the Department of the Army undertook a joint plan with the West German Army to remove chemical weapons from their storage site in West Germany and transport them to the Johnston Atoll for disposal in the Johnston Atoll Chemical Agent Disposal System.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 753-54.
[105] *Id.* at 757-58.

interfere with the President's foreign affairs powers.[106] The court felt that applying NEPA to the movement within West Germany would show a "lack of respect for the Federal Republic of Germany's sovereignty, authority and control over actions within its borders."[107] In considering the application of NEPA to the transoceanic shipment of the munitions, the court acknowledged that although the Army was no longer acting within the borders of a foreign nation, or in concert with a foreign nation, the transoceanic shipment was a necessary consequence of the stockpile's removal from West Germany and many of the same foreign policy concerns were implicated.[108] The court was also persuaded that, although Executive Order 12,114 did not preempt NEPA's extraterritorial application, compliance with that order would be given weight in determining whether the shipment phase must be incorporated in the Johnston Atoll EIS.[109] Swayed by foreign policy considerations, and the adequacy of the environmental assessment performed under Executive Order 12,114, the court concluded that NEPA had not been violated by the failure "to consider the transoceanic shipment of chemical munitions to Johnston Atoll in the same comprehensive EIS as the incineration of those munitions."[110] Accordingly, the plaintiff's motion for injunctive relief was denied.[111]

In Environmental Defense Fund v. Massey, the plaintiffs challenged the National Science Foundation's plans to incinerate waste at McMurdo Station in the Antarctica, alleging violations of both NEPA and Executive Order 12,114 (the National Science Foundation had not prepared an EIS, nor any other environmental

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[106] *Id.* at 761.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 762.

assessment).[112] The district court dismissed the case for lack of subject matter jurisdiction, finding an absence of congressional intent to apply NEPA extraterritorially and noting that Executive Order 12,114 does not provide for a private cause of action.[113] The court of Appeals reversed, holding that the application of NEPA to federal actions is not limited to actions occurring or having effects within the United States.[114] The court found that the presumption against the extraterritorial application of U.S. law does not apply where the "conduct regulated by the government occurs within the United States."[115] This focus on the location of the decision making process marks a dramatic shift from previous caselaw and raises the question whether there are ever extraterritorial issues with NEPA, as decisions will generally be made within the United States, even when the impacts are felt outside of U.S. territory. Finding that NEPA is designed to "control the decision making process...not the substance of agency decisions", and that "the decision making processes of federal agencies take place almost exclusively in this country" the court refused to apply the presumption against extraterritorial application to NEPA.[116] Next the court looked for any foreign policy implications that might result from the application of NEPA in this case and found that Antartica's "sovereignless" status did not "present the challenges inherent in the relations between sovereign nations."[117] The court was also swayed by the legislative control exercised over McMurdo station,

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[110] *Id.*
[111] *Id.*
[112] Environmental Defense Fund v. Massey, 772 F.Supp. 1296-97 (D.D.C. 1991) rev'd 986 F.2d 528 (D.C. Cir. 1993).
[113] *Id.* at 1298.
[114] Massey, 986 F.2d at 532.
[115] *Id.* at 531.
[116] *Id.* at 532.
[117] *Id.* at 534.

and travel to and from Antartica, by the United States.[118] In ultimately applying NEPA's EIS requirement to the National Science Foundation's actions in Antartica, the court did, however, note that foreign policy considerations may in some cases prevent NEPA's application, but failed to elaborate a balancing test.[119]

Just when it seemed that the only restraint on the extraterritorial application of NEPA was the presence of foreign policy implications, two United States Supreme Court decisions in non-NEPA cases dramatically limited the holding in *Massey*. In both Smith v. United States[120] and Sale v. Haitian Centers Council, Inc.,[121] the highest court in the land reaffirmed the vitality of the presumption against the extraterritorial application of U.S. law, concluding that "the presumption is rooted in a number of considerations, not the least of which is the common sense notion that Congress generally legislates with domestic concerns in mind,"[122] and that "the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations."[123]

NEPA Coalition of Japan v. Aspin[124] further weakened the "headquarters theory" of *Massey* and demonstrated the significant weight that foreign policy concerns carry when balanced against desirability of extraterritorial application of NEPA. In this case, a coalition of Japanese citizens and environmental groups, citing the holding in Environmental Defense Fund v. Massey, alleged that the United States Navy's failure to prepare an EIS covering its activities and bases in Japan was a

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[118] *Id.*
[119] *Id.* at 537.
[120] 507 U.S. 197 (1993).
[121] 509 U.S. 155 (1993).
[122] *Supra* note 121 at 206.
[123] *Supra* note 122 at 174.
[124] 837 F. Supp. 466 (D.D.C. 1993).

failure to comply with NEPA.[125] The court, however, rejected that argument, noting that the status U.S. military bases in a foreign country were "not analogous to the status of American research stations in Antartica."[126] The court found that the plaintiffs had failed to demonstrate that "Congress intended NEPA to apply in situations where there is a substantial likelihood that treaty relations will be affected," and determined that U.S. foreign policy interests clearly outweighed any benefits of applying the EIS requirement.[127] The court limited its holding to instances with "clear foreign policy and treaty concerns involving a security relationship between the United States and a sovereign power" and left open the question whether NEPA might apply when treaty and foreign policy considerations were less apparent.[128]

VIII. Analysis

Judge Snyder's holding in NRDC v. the United States Department of the Navy demonstrates that the "headquarters theory" of *Massey* is still very much alive and well. Referring to *Massey*, Judge Snyder indicated she found its reasoning persuasive, noting that "like the NSF's decision at issue in *Massey*, planning for the LWAD program takes place entirely in the United States and is therefore not subject to the presumption against territoriality."[129] Citing the unique procedural nature of NEPA, Judge Snyder indicated that it's substantive effect outside of the United States is minimal.[130] She also recognized the potential foreign policy exceptions to applying NEPA beyond U.S. borders, but noted that both *Massey* and NRDC v. United States

[125] *Id.* at 466-67.
[126] *Id.*
[127] *Id.* at 467-68.
[128] *Id.* at 468.

Department of the Navy involve global commons (Antarctica and the EEZ) and therefore application of NEPA would not "implicate important foreign policy concerns or demonstrate a lack of respect for another nation's sovereignty."[131] For this very reason, both *Massey* and NRDC v. United States Department of the Navy can be distinguished from NEPA Coalition of Japan v. Aspin and NRDC v. NRC.[132] In response to the Department of the Navy's argument that Executive order 12,114 provides the exclusive determinations regarding the furtherance of the purpose of NEPA outside of the United States, the court relied on *Stone*'s holding that Executive Order 12,114 did not preempt the application of NEPA to all federal actions outside of the United States.[133] Finally, regarding the plain language of NEPA and its legislative history, Judge Snyder agreed with the court's conclusion in Saipan ex rel. Guerrero v. United States that both the language and legislative history of NEPA indicate congressional intent to apply the statute to all areas under United States control, and concluded that, because the United States exercises substantial legislative control over the EEZ, NEPA should apply to federal actions which may affect the environment in the EEZ.[134]

Judge Snyder's ruling will not only impact future LWAD tests, but may also affect a host of other activities, including fisheries management, offshore oil and gas leasing, ocean dumping and pipeline construction. While arguably dicta because the holding was not necessary to the ultimate result (the dismissal of the plaintiff's programmatic challenge), even if controlling, the ruling's precedence is limited to the

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[129] *Supra* note 1 at 17.
[130] *Id.*
[131] *Id.* at 18-19.
[132] *Id.*

Central District of California. Nonetheless, this ruling provides environmental groups with a case to hang their hat on when raising the extraterritorial application issue in any U.S. court and will no doubt be cited in future cases. While federal agencies may not choose to accept this ruling and apply NEPA to their activities in the EEZ, at a minimum they will certainly beef up the environmental assessments they do under Executive Order 12,114 in anticipation of litigation.

IX. Recommendations

The broad, sweeping language of NEPA fails to clearly state the intent of Congress concerning the extraterritorial application NEPA. Unfortunately, extensive litigation has done little to clarify the ambiguity regarding the reach of NEPA. While Executive Order 12114 attempts to fill the gaps in NEPA, it falls far short of providing adequate environmental protection due to its numerous exemptions and lack of an enforcement mechanism. Although NRDC v. United States Department of the Navy appears to breathe new life into the Massey "headquarters theory" it is very limited in its holding and precedential value. A Congressional amendment bringing clarity and consistency to the application of NEPA is long overdue. This amendment should reflect the transboundary nature of environmental issues and recognize that we owe the global environment the same standard of care that we exercise within the United States. The United States has demonstrated little reluctance in assuming the role of world leader in other areas, it is now time to assume that role regarding the protection of the environment. NEPA should be amended to make its international

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[133] *Id* at 21.
[134] *Id.*.

application explicit, with exemptions limited to cases that demonstrate a severe impact on national security or undermine United States diplomatic initiatives. The national security and foreign policy exemptions should be allowed only after Presidential review and a demonstration of a compelling conflict with national security or foreign policy.